

**STATE OF INDIANA  
Board of Tax Review**

In the matter of the Petition for	)	
Correction of an Error, Form 133	)	Petition Nos.:02-046-95-3-7-50031
		02-046-96-3-7-50032
Personal Property		02-046-97-3-7-50033

Assessment Years: 1995, 1996, 1997

Petitioner: Westwood Lumber Sales, Inc.  
1407 Bandelier Road  
New Haven, IN 46774-0526

Petitioner Representative: Burt Brunner, CPA  
Bair, Rupp, Simpson, Zorger  
3400 East Coliseum Boulevard, Suite 310  
Fort Wayne, IN 46805

**Findings of Fact and Conclusions of Law**

On January 1, 2002, pursuant to Public Law 198-2001, the Indiana Board of Tax Review (IBTR) assumed jurisdiction of all appeals then pending with the State Board of Tax Commissioners (SBTC), or the Appeals Division of the State Board of Tax Commissioners (Appeals Division). For convenience of reference, each entity (the IBTR, SBTC, and Appeals Division) is hereafter, without distinction, referred to as "State". The State having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

## Issue

Whether the assessment should include an interstate commerce inventory exemption.

## Findings of Fact

1. If appropriate, any finding of fact made herein shall also be considered a conclusion of law. Also, if appropriate, any conclusion of law made herein shall also be considered a finding of fact.
  
2. Westwood Lumber Sales, Inc. (Westwood) is a wholesaler of lumber supplies, located at 1407 Bandelier Road, New Haven, Indiana (Jefferson Township, Allen County). Westwood filed Business Tangible Personal Property Assessment Returns (Forms 103) for the 1995, 1996, and 1997 assessment years. The assessed values self-reported by Westwood were \$328,220 in 1995, \$395,320 in 1996, and \$551,580 in 1997. *Board Ex. A.*
  
3. Pursuant to Ind. Code § 6-1.1-15-12, Westwood filed Petitions for Correction of an Error (Forms 133) to the Allen County Auditor. On July 20, 1998 the Allen County Board of Review denied the petitions. On July 27, 1998, Westwood filed the Form 133 petitions to the State. *Id.*
  
4. Pursuant to Ind. Code § 6-1.1-15-4, a hearing was held on October 2, 2001, before Hearing Officer Joseph Stanford. Testimony and exhibits were received into evidence. Burt Brunner, CPA, and Jeffrey A. Baker represented Westwood. Mike Ternet represented Allen County.
  
5. At the hearing, the subject Form 133 petition was made part of the record and labeled Board Ex. A. The Notice of Hearing on Petition was labeled Board Ex. B. In addition, the following exhibits were submitted to the State:  
Petitioner's Ex. 1 – Westwood's U.S. Income Tax Return.  
Petitioner's Ex. 2 – Out-of-state sales worksheet.

6. Westwood is a wholesaler only. There are no retail sales. *Baker Testimony*.
7. Westwood had out-of-state sales during the assessment years in question. Out-of-state sales were made to locations in Ohio, Michigan, and Florida. *Brunner Testimony, Petitioner's Ex. 2*. Westwood did not claim interstate commerce inventory exemptions on the originally filed Forms 103, and did not attach Form 103-W, Return of Personal Property in Warehouses, Grain Elevators or Other Storage Places (Claimed to be Exempt from Assessment), with the originally filed Forms 103. *Brunner Testimony, Board Ex. A*.
8. On the Forms 133, Westwood claims interstate commerce inventory exemptions of \$300,203 (27.42%) in 1995, \$339,952 (30.14%) in 1996, and \$423,985 (26.53%) in 1997. The exemptions are claimed under Ind. Code § 6-1.1-10-29.3, or 50 IAC 4.2-12-3(b). *Board Ex. A*.

### **Conclusions of Law**

1. The Petitioner is limited to the issues raised on the Form 133 petition filed with the State. Ind. Code § 6-1.1-15-12. See also the Form 133 petition. Once an appeal is filed with the State, however, the State has the discretion to address issues not raised on the Form 133 petition. *Joyce Sportswear Co. v. State Board of Tax Commissioners*, 684 N.E. 2d 1189, 1191 (Ind. Tax 1997). In this appeal, such discretion will not be exercised and the Petitioner is limited to the issues raised on the Form 133 petition filed with the State.
2. The State is the proper body to hear an appeal of the action of the County pursuant to Ind. Code § 6-1.1-15-3.

## A. Burden

3. Ind. Code § 6-1.1-15-3 requires the State to review the actions of the PTABOA, but does not require the State to review the initial assessment or undertake reassessment of the property. The State has the ability to decide the administrative appeal based upon the evidence presented and to limit its review to the issues the taxpayer presents. *Whitley Products, Inc. v. State Board of Tax Commissioners*, 704 N.E. 2d 1113, 1118 (Ind. Tax 1998) (citing *North Park Cinemas, Inc. v. State Board of Tax Commissioners*, 689 N.E. 2d 765, 769 (Ind. Tax 1997)).
4. In reviewing the actions of the PTABOA, the State is entitled to presume that its actions are correct. “Indeed, if administrative agencies were not entitled to presume that the actions of other administrative agencies were in accordance with Indiana law, there would be a wasteful duplication of effort in the work assigned to agencies.” *Bell v. State Board of Tax Commissioners*, 651 N.E. 2d 816, 820 (Ind. Tax 1995). The taxpayer must overcome that presumption of correctness to prevail in the appeal.
5. It is a fundamental principle of administrative law that the burden of proof is on the person petitioning the agency for relief. 2 Charles H. Koch, Jr., *Administrative Law and Practice*, § 5.51; 73 C.J.S. Public Administrative Law and Procedure, § 128. See also Ind. Code § 4-21.5-2-4(a)(10) (Though the State is exempted from the Indiana Administrative Orders & Procedures Act, it is cited for the proposition that Indiana follows the customary common law rule regarding burden).
6. Taxpayers are expected to make factual presentations to the State regarding alleged errors in assessment. *Whitley*, 704 N.E. 2d at 1119. These presentations should both outline the alleged errors and support the allegations with evidence. “Allegations, unsupported by factual evidence, remain mere allegations.” *Id* (citing *Herb v. State Board of Tax Commissioners*, 656 N.E. 2d.

890, 893 (Ind. Tax 1995)). The State is not required to give weight to evidence that is not probative of the errors the taxpayer alleges. *Whitley*, 704 N.E. 2d at 1119 (citing *Clark v. State Board of Tax Commissioners*, 694 N.E. 2d 1230, 1239, n. 13 (Ind. Tax 1998)).

7. The taxpayer is required to meet his burden of proof at the State administrative level for two reasons. First, the State is an impartial adjudicator, and relieving the taxpayer of his burden of proof would place the State in the untenable position of making the taxpayer's case for him. Second, requiring the taxpayer to meet his burden in the administrative adjudication conserves resources.
8. To meet his burden, the taxpayer must present probative evidence in order to make a prima facie case. In order to establish a prima facie case, the taxpayer must introduce evidence "sufficient to establish a given fact and which if not contradicted will remain sufficient." *Clark*, 694 N.E. 2d at 1233; *GTE North, Inc. v. State Board of Tax Commissioners*, 634 N.E. 2d 882, 887 (Ind. Tax 1994).
9. In the event a taxpayer sustains his burden, the burden then shifts to the local taxing officials to rebut the taxpayer's evidence and justify its decision with substantial evidence. 2 Charles H. Koch, Jr. at §5.1; 73 C.J.S. at § 128. See *Whitley*, 704 N.E. 2d at 1119 (The substantial evidence requirement for a taxpayer challenging a State determination at the Tax Court level is not "triggered" if the taxpayer does not present any probative evidence concerning the error raised. Accordingly, the Tax Court will not reverse the State's final determination even though the taxpayer demonstrates flaws in it).

## **B. Conclusions Regarding the Interstate Commerce Inventory Exemption Claim**

10. The general provisions for Deductions, Exemptions and Credits for Inventory are found 50 IAC 4.2-12-1(a) which states in part:

The property must be reported and claimed exempt annually on the business tangible personal property return in a timely manner. There

are four (4) sections within the statutes and this article that contain the eligibility requirements for the exemption of goods considered to be in interstate commerce.

11. Personal property owned by a taxpayer is exempt from property taxation under Ind. Code § 6-1.1-10-29.3 and 50 IAC 4.2-12-3(b) if:
  - (a) the property is owned by a nonresident of the state;
  - (b) the owner is able to show by adequate records that property has been shipped into the state and placed in its original package in an in-state warehouse for transshipment to an out-of-state destination; and
  - (c) the property is stored and remains in its original package, without further manufacturing or processing except repackaging, in the in-state warehouse.
  
12. 50 IAC 4.2-12-1(e) states:

These exemptions will be permitted to taxpayers who timely file and show the amount of their claim for exemption on the proper line of the prescribed returns forms, provided the taxpayer is able to document all of the evidence required in subsection (a), or sections 9, 10, and 11, when required to do so by an assessing official or board.
  
13. Ind. Code § 6-1.1-11-1 provides that an “[e]xemption is a privilege that may be waived by a person who owns tangible property that would qualify for the exemption. If the owner does not comply with the statutory procedures for obtaining an exemption, he waived the exemption. If the exemption is waived, the property is subject to taxation.”
  
14. Taxpayers are required to show the amount of their exemption claim on the proper line of an original, timely filed return. 50 IAC 4.2-12-1(e), 50 IAC 4.2-15-11(d)(1). If a taxpayer fails to claim an exemption in this manner, the taxpayer forever waives his right to that exemption. 50 IAC 4.2-15-11(d)(1), *State Board of Tax Commissioners v. Stanadyne, Inc.* 435 N.E. 2d 278 (Ind. App. 1982), *Kentron v. State Board of Tax Commissioners* 572 N.E. 2d 1366 (Ind. Tax 1991), *Dav-Con, Inc. v. State Board of Tax Commissioners* 644 N.E. 2d (Ind. Tax 1994).

15. The statutes and case law are clear, a taxpayer who desires to claim an exemption must follow the statutory procedures. A Petitioner who fails to comply with the statutory procedures waives the exemption. There is no change to the assessment.

The above stated findings and conclusions are issued in conjunction with, and serve as the basis for, the Final Determination in the above captioned matter, both issued by the Indiana Board of Tax Review this \_\_\_\_ day of \_\_\_\_\_, 2002.

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Chairman, Indiana Board of Tax Review